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10/072,179	02/05/2002	Brad Baker	30687-CIP2	2636
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PEACOCK MYERS AND ADAMS P C			MADSEN, ROBERT A	
P O BOX 26927			ART UNIT	
ALBUQUERQUE, NM 871256927			PAPER NUMBER	
			1761	

DATE MAILED: 12/11/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Application No.</b> 10/072,179		<b>Applicant(s)</b> BAKER, BRAD	
	<b>Examiner</b> Robert Madsen		<b>Art Unit</b> 1761	

**-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

1) ☐ Responsive to communication(s) filed on \_\_\_\_.

2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.

3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

4) ☒ Claim(s) 1-23 is/are pending in the application.

4a) Of the above claim(s) \_\_\_\_ is/are withdrawn from consideration.

5) ☐ Claim(s) \_\_\_\_ is/are allowed.

6) ☒ Claim(s) 1-23 is/are rejected.

7) ☐ Claim(s) \_\_\_\_ is/are objected to.

8) ☐ Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

9) ☐ The specification is objected to by the Examiner.

10) ☐ The drawing(s) filed on \_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
       Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
       Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. §§ 119 and 120**

12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
       a) ☐ All    b) ☐ Some \*    c) ☐ None of:  
           1. ☐ Certified copies of the priority documents have been received.  
           2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.  
           3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

13) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application) since a specific reference was included in the first sentence of the specification or in an Application Data Sheet. 37 CFR 1.78.  
       a) ☐ The translation of the foreign language provisional application has been received.

14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121 since a specific reference was included in the first sentence of the specification or in an Application Data Sheet. 37 CFR 1.78.

**Attachment(s)**

1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____.	4) <input type="checkbox"/> Interview Summary (PTO-413) Paper No(s). _____. 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) 6) <input type="checkbox"/> Other: _____
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## **DETAILED ACTION**

### ***Information Disclosure Statement***

1. The information disclosure statement filed May 21, 2002 fails to comply with the provisions of 37 CFR 1.97, 1.98 and MPEP § 609 because no publication date were provided with the "Baby Bottle Pop". This particular reference have not been considered as to the merits. Applicant is advised that the date of any re-submission of any item of information contained in this information disclosure statement or the submission of any missing element(s) will be the date of submission for purposes of determining compliance with the requirements based on the time of filing the statement, including all certification requirements for statements under 37 CFR 1.97(e). See MPEP § 609 ¶ C(1).

### ***Claim Rejections - 35 USC § 102***

2. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

3. Claims 14,15, and 22 are rejected under 35 U.S.C. 102(b) as being anticipated by Howard (1998) as evidenced by Crazy About Candy Website.
4. Howard teaches Baby Bottle Pops comprises a candy nipple (an upper portion),that is licked and dipped into a bottle containing a flowable confectionery, wherein the candy nipple is removably attached to the bottle by screwing the portion together as recited in claims 14 and 22(See page 2, paragraph 3). As evidenced by Crazy About Candy, the candy nipple of Baby Bottle pops is attached to a structure having a stem, as recited in claims 14 , which is cylindrically shaped as recited in claim 15.
5. Claims 14,15,23 are rejected under 35 U.S.C. 102(b) as being anticipated by Ream et al. (US 4902519).
6. Ream et al. teach a soda bottle candy mold (Figure 4) wherein molten candy (i.e. a flowable confectionery ) is poured into a mold (item 55), or a lower portion, with a stem (item 13, which is cylindrical as recited in claim 15) with an item disposed thereon (i.e. gum item 25), gum is "non-edible as recited claim 23, and cover ( item 16) as the upper portion, as recited in claim 14 (column 3, lines 30-44, column 4, lines 25-30).
7. Claims 1-3,12 are rejected under 35 U.S.C. 102(e) as being clearly anticipated by Manzone et al. (US 6159492).
8. See abstract in view of Figure 1 Note that Manzone et al. teach press and turn threaded childproof engagement, which would include a notch, ridges and

grooves (Column 5, lines 25-30) and the container must be rigid in order to be child proof.

***Claim Rejections - 35 USC § 103***

9. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

10. Claims 1-7,9,12,13 are rejected under 35 U.S.C. 103(a) as being unpatentable over Howard, as evidenced by Crazy About Candy Website, in view of Soltesz et al. (US 2836321) and Conrad (US 5112628).

11. Regarding claims 1-7, Howard teaches Baby Bottle Pops comprises a candy nipple (an upper portion), which would include either a sugar or artificial sweetener base as recited in claim 6, that is licked and dipped into a bottle (a lower bottle portion), as recited in claim 5, containing a powdered fruit flavored candy, as recited in claims 4 and 7, wherein the candy nipple is screwed in place (bottom end up) the bottle, as recited in claim 1(See page 2, paragraph 3). As evidenced by Crazy About Candy, the candy nipple is attached to the bottle utilizing a rib and groove structure for storage purposes, as recited in claims 2.

12. However, Howard is silent teaching that when the nipple is attached to the bottle that the nipple extends *into* the bottle, as recited in claim 1, or that notches as recited in claim 3 are also included in the attachment means.

13. Howard teaches a simulated baby bottle. Soltesz et al. teach a baby bottle wherein the nipple for storage purposes is stored within the lower portion via threads and notches (e.g. item 10), as recited in claim 3, wherein the nipple extends into the bottle, as recited in claim 1 (See figures 1-4, Column 1, lines 15-72), Column 1, lines 48-70).

14. Conrad is relied on as further evidence of the conventionality of a baby bottle having the bottom end of an upper portion (i.e. the nipple portion) extending into the lower portion of the bottle for storage purposes (Abstract, Figures 1-3).

15. Therefore, it would have been obvious to modify the bottle of Howard such that the upper portion comprising the candy nipple would include threads such that the candy extends into the lower portion of the bottle when the two portions are attached, as recited in claim 1, since this is a conventional baby bottle nipple storage design and Howard teaches a simulated baby bottle. One would have been substituting one baby bottle storage assembly design for another. It would have further obvious to include notches, as recited in claim 3, since Soltesz et al. teach notches as part of attaching by twisting a nipple to a bottle for storage and one would have been substituting one attachment means for another for the same purpose.

16. Regarding claim 9, Howard also teaches in other "lick and dip" confections using a gas releasing flowable confectionery (Paragraph 2 and 3, Page 2).

Therefore, it would have been obvious to modify the flowable confectionery in the baby bottle and include a gas releasing confectionery since one would have been

substituting one conventional flowable confectionery for another for the same purpose: licking and dipping an edible candy into a container holding a flowable confection.

17. Regarding claims 12 and 13, Howard teaches the bottle is plastic, which would have to be rigid otherwise one could not screw the nipple on without damaging the structure.

18. Claims 8,10, and 11 are rejected under 35 U.S.C. 103(a) as being unpatentable over Howard, as evidenced by Crazy About Candy Website in view of Soltesz et al. (US 2836321) and Conrad (US 5112628) as applied to claims 1-7,9,12,13 above, further in view of Baker (WO 0019803).

19. Howard is silent in teaching the flowable confectionery comprises a luminiferous confectionery or a fluid with viscoelastic properties. Baker also teaches licking and dipping and edible candy into a flowable confectionery and Baker is relied on as evidence of the conventionality of using such materials as alternative flowable confectionery ingredients for a "lick and dip" product (Abstract, Page 5, lines 5 to Page 6, line 30). Therefore, it would have been obvious to include any of the recited confectionery compositions since one would have been substituting one type of flowable confection for another for the same purpose.

20. Claims 16 and 17 are rejected under 35 U.S.C. 103(a) as being unpatentable over Howard, as evidenced by Crazy About Candy Website as applied to claims 14,15, and 22 above, further in view of Hunter (US 1867945).

21. Howard is silent in teach more than one stem in an adjacent configuration. However, Hunter teaches that one may alternatively use one or two stems on a handle to attach an edible item(Column 1, lines 6-14,Column 2, lines 16, Figures). Therefore, to select more than 1 stem, as taught by Howard, would have been obvious since Hunter teaches one may use either one or two stems to attach an edible item to a handle. One would have been substituting one edible item holding stem design for another .

22. Claims 18 and 19 are rejected under 35 U.S.C. 103(a) as being unpatentable over Howard, as evidenced by Crazy About Candy Website as applied to claims 14,15, and 22 above, further in view of Skokowski (US 1929906).

23. Howard is silent in teaching the stem includes a projection and sidewalls with apertures. Skokowski teaches stems that will minimize the possibility of dislodging a food item from the stem (Page 1, lines 1-40). Skokowski teaches stems with projections (i.e. above item 10 in Figure 5 or in Figure 4 the pointed end projects from the otherwise rectangular surface), apertures in the sidewalls (i.e. items 9 in Figure 2 ). Therefore it would have been obvious to further include these features on the stem of Howard since Skokowski teaches it improves the adherence of the edible item to the stem. One would have been substituting one edible item holding stem design for another .



24. Claims 20 and 21 are rejected under 35 U.S.C. 103(a) as being unpatentable over Howard, as evidenced by Crazy About Candy Website as applied to claims 14,15, and 22 above, further in view of Wagner (US 3498808).

25. Howard is silent in teaching the stem includes a protruding sidewalls and channels between sidewalls. Wagner teaches stems for holding food items with protruding sidewalls and channels between sidewalls (i.e. Figure 4 shows side walls 40 and 20 and channels 32,26,30, and 38 between) for the purpose of ease of use with automatic dispensing machines and improves bonding with the food item (Column 3, lines 25-38). Therefore, it would have been obvious to modify Howard and include a stem with protruding sidewalls and channels between since this would improve bonding to the edible item, and one would have been substituting one conventional stem design for another for holding an edible item.

### ***Double Patenting***

26. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970);and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

27. A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

28. Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

29. Claims 1-14,20,22 are provisionally rejected under the judicially created doctrine of double patenting over claims 1,7,10-22 of copending Application No. 09/874,440. This is a provisional double patenting rejection since the conflicting claims have not yet been patented.

30. The subject matter claimed in the instant application is fully disclosed in the referenced copending application and would be covered by any patent granted on that copending application since the referenced copending application and the instant application are claiming common subject matter, as follows: a confectionery comprising a bottle shaped container with an upper and lower portion, an edible candy disposed on the upper portion extending into the lower portion, and the upper portion attaches by twisting.

31. Furthermore, there is no apparent reason why applicant would be prevented from presenting claims corresponding to those of the instant application in the other copending application. See *In re Schneller*, 397 F.2d 350, 158 USPQ 210 (CCPA 1968). See also MPEP § 804.

32. Claims 16 and 17 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1,7,10-22 of copending Application No. 09/874,440 in view of Hunter (US 1867945).

33. '440 does not claim one stem in an adjacent configuration. However, Hunter teaches that one may alternatively use one or two stems on a handle to attach an edible item (Column 1, lines 6-14, Column 2, lines 16, Figures).

Therefore, to select more than 1 stem, as taught by Howard, would have been obvious since Hunter teaches one may use either one or two stems to attach an edible item to a handle. One would have been substituting one edible item holding stem design for another. This is a provisional obviousness-type double patenting rejection.

34. Claims 18 and 19 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1,7,10-22 of copending Application No. 09/874,440 in view of Skokowski (US 1929906).

35. '440 does not claim the stem includes a projection and sidewalls with apertures. Skokowski teaches stems that will minimize the possibility of dislodging a food item from the stem (Page 1, lines 1-40). Skokowski teaches stems with projections (i.e. above item 10 in Figure 5 or in Figure 4 the pointed end projects from the otherwise rectangular surface), apertures in the sidewalls (i.e. items 9 in Figure 2 ). Therefore it would have been obvious to further include these features on the stem since Skokowski teaches it improves the adherence of the edible item to the stem. One would have been substituting one edible item holding stem design for another. This is a provisional obviousness-type double patenting rejection.

36. Claims 20 and 21 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims

1,7,10-22 of copending Application No. 09/874,440 in view of Wagner (US 3498808).

37. '440 does not claim the stem includes a protruding sidewalls and channels between sidewalls. Wagner teaches stems for holding food items with protruding sidewalls and channels between sidewalls (i.e. Figure 4 shows side walls 40 and 20 and channels 32,26,30, and 38 between) for the purpose of ease of use with automatic dispensing machines and improve bonding with the food item (Column 3, lines 25-38). Therefore, it would have been obvious to include a stem with protruding sidewalls and channels between since this would improve bonding to the edible item, and one would have been substituting one conventional stem design for another for holding an edible item. This is a provisional obviousness-type double patenting rejection.

38. Claim 23 is provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1,7,10-22 of copending Application No. 09/874,440 in view of Baker (WO 0019803).

39. '440 does not claim an inedible item attached to the stem. Baker teaches the same flowable confectionery compositions as '440 that may be used in combination with inedible items for dipping and consuming the flowable confection (See claims 1-20, Page 5, line 5 to Page 6, line 2). Therefore, it would have been obvious to optionally include an in-edible item on the stem since one would have been substituting one item for another for the same purpose. This is a provisional obviousness-type double patenting rejection.

40. Claims 14 and 22 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claim 1-7 of copending Application No. 09/874,447. This is a provisional double patenting rejection since the conflicting claims have not yet been patented.

41. The subject matter claimed in the instant application is fully disclosed in the referenced copending application and would be covered by any patent granted on that copending application since the referenced copending application and the instant application are claiming common subject matter, as follows: a confectionery comprising a bottle shaped container with an upper and lower portion, an edible candy disposed on the upper portion extending into the lower portion.

42. Furthermore, there is no apparent reason why applicant would be prevented from presenting claims corresponding to those of the instant application in the other copending application. See *In re Schneller*, 397 F.2d 350, 158 USPQ 210 (CCPA 1968). See also MPEP § 804.

43. Claims 15,16 and 17 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-7 of copending Application No. 09/874,447 in view of Hunter (US 1867945).

44. '447 does not claim one stem in an adjacent configuration or a rectangular stem. However, Hunter teaches that one may alternatively use one or two stems, each being rectangular, on a handle to attach an edible item(Column 1,

lines 6-14, Column 2, lines 16, Figures). Therefore, to select more than 1 stem, as taught by Howard, would have been obvious since Hunter teaches one may use either one or two stems that are rectangular to attach an edible item to a handle. One would have been substituting one edible item holding stem design for another. This is a provisional obviousness-type double patenting rejection.

45. Claims 18 and 19 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-7 of copending Application No. 09/874,447 in view of Skokowski (US 1929906).

46. '447 does not claim the stem includes a projection and sidewalls with apertures. Skokowski teaches stems that will minimize the possibility of dislodging a food item from the stem (Page 1, lines 1-40). Skokowski teaches stems with projections (i.e. above item 10 in Figure 5 or in Figure 4 the pointed end projects from the otherwise rectangular surface), apertures in the sidewalls (i.e. items 9 in Figure 2). Therefore it would have been obvious to further include these features on the stem since Skokowski teaches it improves the adherence of the edible item to the stem. One would have been substituting one edible item holding stem design for another. This is a provisional obviousness-type double patenting rejection.

47. Claims 20 and 21 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-7 of copending Application No. 09/874,447 in view of Wagner (US 3498808).

48. '447 does not claim the stem includes a protruding sidewalls and channels between sidewalls. Wagner teaches stems for holding food items with protruding sidewalls and channels between sidewalls (i.e. Figure 4 shows side walls 40 and 20 and channels 32,26,30, and 38 between) for the purpose of ease of use with automatic dispensing machines and improve bonding with the food item (Column 3, lines 25-38). Therefore, it would have been obvious to include a stem with protruding sidewalls and channels between since this would improve bonding to the edible item, and one would have been substituting one conventional stem design for another for holding an edible item. This is a provisional obviousness-type double patenting rejection.

49. Claim 23 is provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-7 of copending Application No. 09/874,447 in view of Baker (WO 0019803).

50. '447 does not claim an inedible item attached to the stem. Baker teaches the same flowable confectionery compositions as '440 that may be used in combination with inedible items for dipping and consuming the flowable confection (See claims 1-20, Page 5, line 5 to Page 6, line 2). Therefore, it would have been obvious to optionally include an in-edible item on the stem since one would have been substituting one item for another for the same purpose. This is a provisional obviousness-type double patenting rejection.

51. Claims 1-7,12,13 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-7 of copending Application No. 09/874,447 in view of Manzone et al. (US 6159492).

52. '447 claims a bottle with an upper portion having an edible candy extending into the lower portion containing a flowable confectionery 4 and 5, which would inherently comprise a sugar or sugar substitute, as recited in claim 6, and a flavor or color agent as recited in claim 7, and rigid materials as recited in claims 12 and 13 wherein the two portions are attachable but '447 does not claim any particular means for attaching the upper and lower portions as recited in claims 1-3. Manzone et al. teach a bottle shape with pressing and twisting an upper portion (e.g. a releasable lockable childproof cap in Column 2, lines 20-55) with a edible candy disposed into a lower portion. Therefore, it would have been obvious to include the recited twisting/rib and groove/notch structure (a child proof cap with pressing and twisting) as recited in claims 1-3, since one would have been substituting one method of attaching the upper portion comprising a hard candy to the lower portion of a bottle. This is a provisional obviousness-type double patenting rejection.

53. Claims 8-11 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-7 of copending Application No. 09/874, of Baker (WO 0019803).



54. '447 does not claim any particular candy and flowable confectionery composition. Baker teaches the recited candy and flowable confectionery compositions (See claims 1-20, Page 5, line 5 to Page 6, line 2). Therefore, it would have been obvious to form the candy and flowable confectionery from the recited compositions since one would have been substituting one candy, flowable confectionery composition, and stem for another for the same purpose. This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.


**Conclusion**

55. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Robert Madsen whose telephone number is (703)305-0068. The examiner can normally be reached on 7:00AM-3:30PM M-F.

56. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (703)308-3959. The fax phone number for the organization where this application or proceeding is assigned is (703)872-9310.

57. Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-0061.

Robert Madsen  
Examiner  
Art Unit 1761

  
MILTON I. CANO  
SUPERVISORY PATENT EXAMINER  
TECHNOLOGY CENTER 1700